case all over again beyond any reasonable doubt by evidence in accordance with law. In this particular case, the obligation included the duty to decide whether it intended to prove that the subject matter of the charge was heroin either by calling the government chemist or by invoking the proviso to s 399(i) of the CPC to admit the chemist's report. There was no duty on the part of the appellant to do or assume anything in the conduct of the prosecution. We accordingly held that if the prosecution had for whatever reason intended not to call the government chemist to give evidence at the retrial notwithstanding the serious error discovered in the chemist's report in the earlier appeal, then it must once again comply with the condition precedent imposed by s 399(i) of the CPC in order to render the chemist's report admissible in evidence. The failure by the prosecution to re-serve the chemist's report on the appellant at the retrial was undoubtedly fatal to its case.

For the above reasons we had allowed this appeal by quashing the conviction and setting aside the death sentence. The chemist's report being inadmissible, there was no evidence before the court that the subject matter of the charge was heroin within the meaning of s 2 of the Dangerous Drugs Act 1952. The appellant was accordingly acquitted and discharged.

Appeal allowed and conviction quashed.

Solicitors: *Abdul Rahman Saad & Associates.*

Reported by *Prof Ahmad Ibrahim*

William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-447-90
ABDUL HAMID OMAR LP, HARUN HASHIM AND GUNN CHIT TUAN SCJJ
3 MAY 1991

Civil Procedure — Solicitors — Authority to act challenged — Whether court can order action to be struck out or stay the proceedings and determine issue on application of party by motion or summons

Civil Procedure — Appeal — Fresh evidence at appeal — Direction of appellate court to admit fresh evidence — Courts of Judicature Act 1964, s 69(1)

In this case the appellant had brought an action against the respondents for breach of service contract and breach of fiduciary duty owed to the appellant. At the hearing to set aside the interlocutory injunction which had been granted, the respondents' solicitors orally raised a preliminary objection and questioned the authority of certain solicitors to act for the appellant. The learned judge after hearing submissions by counsel upheld the objection of the respondents and ordered that the appellant's action be struck out. The appellant appealed and applied for leave to adduce fresh evidence.

Held, staying the appeal:

(1) The Supreme Court in hearing an appeal has a full and general discretion to admit fresh evidence under s 69(1) of the Courts of Judicature Act 1964. In this case the court was satisfied as to the reason why the evidence was deliberately not adduced in the court below and the court therefore made an order giving leave for the evidence to be produced.

(2) A challenge to the authority of solicitors may be made at any time and the court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck out if there was sufficient or admitted evidence that there is no action properly before it. But where there is no such evidence, the court should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons.

(3) In the circumstances of this case, the court stayed the appeal and remitted the case to the High Court for the trial judge to hear and consider the challenge on the appellant's solicitors' authority on a substantive application.

[Bahasa Malaysia summary

Di dalam kes ini perayu telah membawa tindakan terhadap responden kerana kemungkiran kontrak perkhidmatan dan kewajipan fidusiari terhadap perayu. Di masa perbicaraan mengenepikan injunksi interlokutori yang telah diberi, peguam responden telah secara lisan menimbulkan bantahan permulaan dan mencabar kuasa peguam-peguam berkenaan bertindak bagi pihak perayu. Hakim yang arif setelah mendengar hujah-hujah peguam telah membenarkan bantahan responden dan beliau telah memerintahkan tindakan perayu itu dibatalkan. Perayu telah membuat rayuan dan memohon kebenaran mengemukakan keterangan baharu.

Diputuskan, menggantungkan rayuan itu:

(1) Mahkamah Agung di dalam mendengar rayuan mempunyai bidang kuasa penuh dan secara am menerima keterangan baharu di bawah s 69(1) Akta Mahkamah Kehakiman 1964. Di dalam kes ini mahkamah berpuashati dengan sebab-sebab mengapa keterangan itu sengaja tidak diberi di mahkamah bawahan, dan oleh kerana itu mahkamah membuat perintah memberi kebenaran supaya keterangan itu diberi.

(2) Cabaran kepada kuasa peguam boleh dibuat pada bila-bila masa dan mahkamah dengan bidang kuasa sedia adanya boleh melayan cabaran yang dibuat secara lisan dan boleh memerintahkan tindakan itu dibatalkan jika terdapat keterangan yang mencukupi atau diakui bahawa tidak ada tindakan yang sah di hadapannya. Akan tetapi apabila tidak terdapat keterangan sedemikian, mahkamah hendaklah hanya menggantungkan prosiding itu dan memutuskan isu ketiadaan kuasa itu atas permohonan pihak dalam kes itu yang dibuat secara usul atau saman.

(3) Di dalam keadaan kes ini, mahkamah telah menggantungkan rayuan dan menghantar balik kes ini kepada Mahkamah Tinggi supaya hakim perbicaraan itu mendengar dan menimbangkan cabaran kepada kuasa peguam perayu di dalam permohonan substantif.]

Cases referred to

1 *Khoo Leong Kee* v *LY Swee Co* [1968] 2 MLJ 104 (distd)
2 *Chin Kok Kwong Construction Sdn Bhd* v *Sunrise Towers Sdn Bhd* [1986] 2 MLJ 41 (distd)
3 *Simmons* v *Liberal Opinion Ltd* [1911] 1 KB 966 (distd)
4 *Richmond* v *Branson & Son* [1914] 1 Ch 968 (folld)
5 *John Shaw & Sons (Salford) Ltd* v *Peter Shaw & John Shaw* [1935] 2 KB 113 (refd)
6 *Ladd* v *Marshall* [1954] 3 All ER 745 (refd)

7 *Russian Commercial and Industrial Bank* v *Comptoir D'escompte De Mulhouse & Ors* [1923] 2 KB 630 (refd)
8 *Fresh Food & Refrigerating Co Ltd* v *Sime & Co* [1935] MLJ 196 (refd)
9 *Russian Commercial and Industrial Bank* v *Comptoir D'Escompte De Mulhouse & Ors* [1925] AC 112 (refd)

Legislation referred to
Courts of Judicature Act 1964 s 69(1)
Rules of the Supreme Court 1980 r 51

Appeal from: Civil Suit No D5-22-870-90 (High Court, Kuala Lumpur)

Cecil Abraham (*Karen Goonting* with him) for the appellant.
Shamsul Bahrain bin Ibrahim (*K Balaguru* with him) for the respondents.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): After filing its record of appeal on 23 November 1990, William Jacks & Co (M) Sdn Bhd ('the appellant') filed a notice of motion dated 8 January 1991, to move the court pursuant to s 69(1) of the Courts of Judicature Act 1964, read with r 51 of the Rules of the Supreme Court 1980, for an order that:

(i) the appellant, as applicant, be granted leave to insert a copy of the sealed order dated 9 October 1990 into the record of appeal filed on 23 November 1990; and
(ii) the appellant, as applicant, be granted leave to admit by affidavit the appellant's board resolution dated 18 May 1990 as further evidence.

The appellant had on 29 May 1990 instituted an action through M/s Paul Chong & Kraal against Chemquip (M) Sdn Bhd and one Amy Yew Sze Kiat @ Eew Sze Chieh (f) ('the respondents') for, inter alia, breach of a service contract and breach of fudiciary duty owed to the appellant. The relief claimed was substantially to restrain the respondents from exploiting confidential information with regard to certain equipment supply contracts for their own benefit and gain. On 30 May 1990, the appellant obtained an interlocutory injunction to restrain the respondents from dealing in those disputed equipment. At the hearing of an application on 4 October 1990 to set aside the interlocutory injunction, the respondents' solicitors orally raised a preliminary objection and questioned the authority of M/s Paul Chong & Kraal to act for the appellant. After hearing submissions by counsel, Wan Adnan J upheld the respondents' objection and ordered that the appellant's action be struck off with costs.

Before us, Mr Cecil Abraham, senior counsel for the appellant, referred to the judgment of the learned trial judge in which his Lordship expressed the view that a challenge to the authority of solicitors can be made at any time and that 'the court may in its inherent jurisdiction entertain the challenge made orally at any stage of the proceedings and may refuse to proceed further with the proceedings if the court can come to a conclusion on sufficient or admitted evidence that there is no action properly before it.' It was the contention of counsel that if the learned judge had considered carefully the three cases referred to by him in his judgment, namely, *Khoo Leong Kee* v *LY Swee Co*,[1] *Chin Kok Kwong Construction Sdn Bhd* v *Sunrise Towers Sdn Bhd*,[2] and *Simmons* v *Liberal Opinion Ltd*,[3] he would have seen that there was basic evidence before the court in those cases that the suits were instituted without authority and should be dismissed with costs. It was the submission of the appellant's counsel that those cases were distinguishable on their facts because, unlike those cases, in the present case there was no evidence at all of any document regarding authority to act before the court.

Mr Abraham pointed out that the learned judge did refer to the following passage in the judgment of Warrington J in *Richmond* v *Branson & Son*[4] at p 974:

> But the real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? No authority has been cited in support of the affirmative of such a proposition, and, in my opinion, it is impossible, according to the ordinary practice and procedure of the court, to justify that proposition. The business of this court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in the proper form of proceeding, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority.

and contended that that case clearly supported the appellant's position that a substantive application on the part of the parties concerned to stay proceedings on the ground of want of authority is required.

The learned judge had also referred to the following passage in the judgment of Slesser LJ in *John Shaw & Sons (Salford) Ltd* v *Peter Shaw & John Shaw*[5] at p 145:

> In my view, the reasons for the conclusion of the House of Lords and of Atkin LJ in the *Russian Bank* case and of Warrington J in *Richmond* v *Branson* were that in those cases questions of fact on which it needed to be decided whether there was or was not authority had to be considered, and the court declined to go into such matters of evidence except upon a substantive motion. But the rights of the court in its inherent jurisdiction to stay actions which would be an abuse of its process if they are not properly upon the record, either because the plaintiff was not existent at the time of the issue of the writ or because they are satisfied on the facts that he had not authorized the proceedings, has so far been undoubted, and this, altogether apart from the desire of either party, if the facts are before the court. Where the court may properly come to a conclusion on sufficient or admitted evidence that there is no action properly before it, it may well think it right to act in accordance with that inherent jurisdiction, to refuse to proceed, and the difference which has been sought to be found between the case where no retainer could be given at all, and the case where what is still in dispute is whether in

> fact there was or was not authority to give one is not a difference in principle, but a difference of expediency, depending upon whether a court is or is not so informed of the facts that it does or does not think it right to come to a conclusion on the matter as a question of law.

but counsel pointed out that Slesser LJ was the dissenting judge who gave a contrary opinion in the UK Court of Appeal, and contended that that case again supported the appellant's position in that a substantive motion is required and that the court can only come to the conclusion of lack of authority on sufficient or admitted evidence but that in this case there was no evidence whatsoever before the court.

It was therefore the contention of counsel for the appellant that the judgment of the lower court was erroneous in law because the learned judge did not have sufficient or no evidence at all before him to decide on this issue. He did not have the benefit of the memorandum and articles of the appellant or its board resolution and therefore the judgment was erroneous. Counsel also pointed out that a perusal of the notes of evidence (p 50 of the appeal records) shows that none of the letters written by the respondents were tendered as evidence before the court and that therefore there was neither admitted nor sufficient evidence for the learned trial judge to come to any conclusion.

On the necessity of a formal application to the court to challenge the appellant's solicitors' authority, counsel then referred to 44 *Halsbury's Laws of England* (4th Ed) para 115:

> **Effect of acting without authority**. The fact that a solicitor was not authorised to institute proceedings is not a defence to those proceedings and, although in special circumstances the correct course may be for the court to strike out proceedings instituted without authority, the proper method of raising the question of want of authority is usually by an application to stay the proceedings. Accordingly, if a solicitor takes, defends or continues proceedings without the authority of the litigant whom he purports to represent, those proceedings will be summarily stayed if the proceedings are instituted without authority, or the defence will be struck out if they are defended without authority, on the application of a party by motion or summons.

He then submitted that the learned judge, upon discovery of the purported lack of authority of the appellant's solicitors to bring the suit, should have stayed the action on terms rather than dismissing it in order to enable the appellant to remedy the situation.

Mr Balaguru, one of counsel for the respondents, referred us to para 693 in 37 *Halsbury's Laws of England* (4th Ed) concerning appeals and pointed out that 'before further evidence will be admitted, (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) the evidence must be apparently credible although it need not be incontrovertible.' (See *Ladd* v *Marshall*[6] at p 748.) Counsel stated that they had asked the appellant's solicitors for their authority to act before the hearing in the High Court but the appellant did not produce the purported board resolution which was available at all material times and it was therefore neither fresh nor further evidence. It was his contention that as the appellant had the opportunity to produce that board resolution in the court below, its notice of motion should be disallowed.

Mr Shamsul Bahrain, the other counsel for the respondents, referred us to *Russian Commercial and Industrial Bank* v *Comptoir D'escompte De Mulhouse*[7] at p 655 in which his Lordship Scrutton LJ had stated obiter in the UK Court of Appeal that an objection regarding authority to act could only be done 'in a particular way, on motion to strike out, is technical in the extreme, and in view of the decision of the House of Lords I think erroneous.' It was his contention that the stand taken by the appellant in this case was also technical and should not be entertained by the court.

Firstly in so far as the said notice of motion was concerned, we considered that the conditions laid down in *Ladd* v *Marshall*[6] regarding the strict approach for fresh evidence to be admitted on appeal only applies where there has been a trial or hearing on the merits. But where there has not been a trial or hearing on the merits as in this case, the *Ladd* v *Marshall*[6] conditions do not apply. But this court has in any case a full and general discretion whether to admit fresh evidence as laid down by 69(1) of the Court of Judicature Act 1964, which reads as follows:

> Hearing of appeals.
>
> (1) Appeal to the Supreme Court shall be by way of rehearing, and in relation to such appeals the Supreme Court shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

In a case where there has been a trial, it is interesting to note that *Fresh Food & Refrigerating Co Ltd* v *Sime & Co*[8] is an instance of a special case in which the Court of Appeal of the former Straits Settlements in Singapore has allowed admission on the hearing of an appeal of evidence which should have been available at the trial, pursuant to s 23 of the repealed Courts Ordinance, which provides that the Court of Appeal shall have 'full discretionary power to receive further evidence by affidavit'. An important factor which has to be taken into account in exercising the appellate court's discretion is the reason why the evidence was not adduced in the court below. In this case, we were satisfied as to the reason why the evidence was deliberately not adduced

in the court below and we therefore made an order as prayed for in the said notice of motion.

Then after considering the submissions of counsel regarding the challenge to the authority of the appellant's solicitors to act, we agreed with the observations of Warrington J in *Richmond* v *Branson & Son*[4] that the business of the courts could not be carried out if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in a proper form of proceeding, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority. We have perused the first three cases referred to by the learned judge in his judgment and agreed with learned counsel for the appellant that they are distinguishable because in those cases there was evidence before the court to prove facts on which the court may properly come to a conclusion on the admitted evidence that there was no action properly before it. In such cases,we would agree with the learned judge that the court may in its inherent jurisdiction entertain a challenge made orally at any stage of the proceedings and may refuse to proceed further with the proceedings if the court can come to a conclusion on sufficient or admitted evidence that there is no action properly before it. But the essential question in this case was whether there was sufficient or admitted evidence before the High Court when the learned judge upheld the respondent counsel's preliminary objection made orally and ordered the appellant's action to be struck off with costs. A perusal of the notes of evidence shows that at the hearing before the learned judge on 4 October 1990, counsel for the respondents merely stated from the Bar that they had written to the appellant's solicitors on 26 September 1990 and 30 October 1990 but there was no evidence produced of those letters to the court.

Although the learned judge referred to the above-quoted passage in the judgment of Slesser LJ in *John Shaw & Sons (Salford) Ltd* v *Peter Shaw & John Shaw*[5] which, we agreed with Mr Abraham, supported the appellant's contention that a substantive motion is required, it would appear that the learned judge had overlooked the following passages in the judgments of Greer LJ and Roche LJ respectively in the same case at pp 131 and 147 respectively:

> In *Russian Commercial and Industrial Bank* v *Comptoir d'Escompte de Mulhouse*, the court held that the evidence established that the English representative of the Russian corporation had authority to bring the action, but Lords Cave and Atkinson and Atkin LJ went beyond what was necessary to decide the case and expressed the opinion that the point of want of authority could not be raised by way of defence, but ought to be raised by notice of motion to stay or dismiss the action. These observations do not, in my judgment, mean that if the facts actually put in evidence prove that the solicitors commenced the proceedings without any authority from the named plaintiff, the court ought to ignore those facts, and give judgment in favour of or against a party who ex hypothesi is not present in court. In my opinion the court has inherent jurisdiction to say 'as it is clearly established that the action has been brought by solicitors who were not authorized by the named plaintiff to bring it, we will strike it out.' (Greer LJ)

and

> As to the preliminary question whether the plaintiff company was properly before the court, that is to say, whether the action was instituted and carried on with its authority, I have arrived at the same result as Greer LJ, but for different reasons, which I propose briefly to state.
>
> I agree with both the Lord Justices as to the result of the decided cases and particularly of the *Daimler* case and of the *Russian Commercial Bank* case. The principles to be derived from them are that such an objection to a right to sue as is here taken should be taken not at the trial but by an interlocutory motion or summons; that if such procedure is not adopted the court need not, and ordinarily should not, entertain such an objection at the trial as if it were a defence. If it were otherwise, then for reasons pointed out by Warrington J in *Richmond* v *Branson*, the position of the court would be well nigh intolerable. Nevertheless, as appears from the decision in the *Daimler* case, if want of capacity or authority to sue plainly appears at any stage the court may then strike out the action. (Roche LJ)

We would also note and point out that the case of *Russian Commercial and Industrial Bank* v *Comptoir D'escompte De Mulhouse & Ors*[9] went up to the House of Lords which held, inter alia, that it was not open to the defence in that case to raise by way of defence to the action the objection that the London branch manager of the plaintiff bank had no authority to bring the action in the name of the plaintiff bank, but that they ought to have moved to strike out the name of the bank as plaintiff. The House of Lords approved *Richmond* v *Branson & Son*[4] in that case.

Although the various dicta in the authorities as to the methods open to a defendant to contest the authority to bring an action are not altogether easy to reconcile or understand, we would agree that a challenge to the authority of solicitors may be made at any time and the court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck off if there was sufficient or admitted evidence that there is no action properly before it. But when there is no such evidence, the court should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons.

In the circumstances of this case, we therefore stayed the appeal and remitted the case to the High Court for the trial judge to hear and consider the challenge to the appellant's solicitors' authority on a substantive application. We also ordered that the costs before us be costs in the cause.

Appeal stayed.

Solicitors: *Paul Chong & Kraal; AK Lee & Co.*

Reported by *Prof Ahmad Ibrahim*